FILED

941219 DEC 14 1994

No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1994

Jerome S. Wagshal,

Petitioner,

v.

Mark W. Foster, et al.

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Jerome S. Wagshal, Pro Se*
5920 Empire Way
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** A member of the Bar of this Court, acting as counsel of record*

December 14, 1994 (Revised)

APPENDICES

APPENDIX A (Opinion of the Court of Appeals)..... ..... A-1

APPENDIX B (Opinion of the District Court) B-1

APPENDIX C (Order denying Rehearing..... C-1

APPENDIX D (Order appointing Foster) ... D-1

APPENDIX E (Statement of Understanding.. E-1

APPENDIX F (Foster letter to the Court). F-1

Appendix G (Foster letter to counsel)... G-1

APPENDIX A

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 12, 1994 Decided July 15, 1994

No. 93–5063

JEROME S. WAGSHAL,
APPELLANT

v.

MARK W. FOSTER, ET AL.,
APPELLEES

Appeal from the United States District Court for the District of Columbia
(92cv02072)

Jerome S. Wagshal argued the cause and filed the briefs pro se.

Charles B. Wayne argued the cause for appellees. With him on the brief were *Charles R. Donnenfeld* and *Jeffery A. Tomasevich*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: SILBERMAN, WILLIAMS and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

WILLIAMS, *Circuit Judge*: This case presents the issue of whether a court-appointed mediator or neutral case evaluator, performing tasks within the scope of his official duties, is entitled to absolute immunity from damages in a suit brought by a disappointed litigant. The district court found such immunity and we agree.

* * *

In June 1990, appellant Jerome S. Wagshal filed suit in D.C. Superior Court against Charles E. Sheetz, the manager of real property owned by Wagshal. In October 1991 the assigned judge, Judge Richard A. Levie, referred the case to alternative dispute resolution pursuant to Superior Court Civil Rule 16[1] and the Superior Court's alternative dispute resolution ("ADR") program. While the program does not bind the parties (except when they agree to binding arbitration), participation is mandatory. See Superior Court Rules of Civil Procedure 16(j).

Judge Levie chose "neutral case evaluation" from among the available ADR options, and appointed Mark W. Foster as case evaluator.[2] Pursuant to the order of appointment, the parties signed a "statement of understanding" providing

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[1] Superior Court Rule 16(b) provides in part: "At [the initial scheduling and settlement] conference the judge will ... explore the possibilities for early resolution through settlement or alternative dispute resolution techniques...."

[2] We use the terms "case evaluator" and "mediator" interchangeably in this opinion. Each acts as a neutral third party assisting the parties to a dispute in exploring the possibility of settlement, the principal difference being that implicit in the name: the case evaluator focuses on helping the parties assess their cases, while the mediator acts more directly to explore settlement possibilities. See Melinda Ostermeyer, Alternative Dispute Resolution Programs 6 (Superior Court of the District of Columbia, Multi-Door Dispute Resolution Division 1992).

(among other things) that the proceedings would be confidential and privileged, and that the evaluator would serve as a "neutral party". Moreover, the parties were not allowed to subpoena the evaluator or any documents submitted in the course of evaluation, and "[i]n no event [could the] mediator or evaluator voluntarily testify on behalf of a party." Wagshal signed in January 1992 (under protest, he alleges).

After Foster held his first session with the parties, Wagshal questioned his neutrality. Foster then asked that Wagshal either waive his objection or pursue it; if Wagshal made no response waiving the objection, Foster would treat it as a definite objection. Receiving no response by the deadline set, and later receiving a communication that he regarded as equivocal, Foster wrote to Judge Levie in February 1992, with copies to counsel, recusing himself. The letter also reported to the judge on his efforts in the case and recommended continuation of ADR proceedings. In particular, Foster said that the case was one "that can and should be settled if the parties are willing to act reasonably", and urged the court to order Wagshal, "as a pre-condition to any further proceedings in his case, to engage in a good faith attempt at mediation." He also urged Judge Levie to "consider who should bear the defendant's costs in participating" in the mediation to date.

Judge Levie then conducted a telephone conference call hearing in which he excused Foster. Wagshal's counsel voiced the claim that underlies this suit—that he thought Foster's withdrawal letter "indicates that he had certain feelings about the case. Now, I'm not familiar with the mediation process but as I understood, the mediator is not supposed to say, give his opinion as to where the merits are." On that subject, Judge Levie said, "I don't know what his opinions are and I'm not going to ask him because that's part of the confidentiality of the process." Neither Wagshal nor his counsel made any objection or motion for Judge Levie's own recusal.

Judge Levie soon after appointed another case evaluator, and Wagshal and the other parties settled the *Sheetz* case in June 1992. In September 1992, however, Wagshal sued Foster and sixteen others (whom he identified as members of Foster's law firm) in federal district court, claiming that Foster's behavior as mediator had violated his rights to due process and to a jury trial under the Fifth and Seventh Amendments, and seeking injunctive relief and damages under 42 U.S.C. § 1983. Besides the federal claims, he threw in a variety of local law theories such as defamation, invasion of privacy, and intentional infliction of emotional distress. His theory is that Foster's conduct as case evaluator forced him to settle the case against his will, resulting in a far lower recovery than if he had pursued the claim.

The district court granted the defendants' motion to dismiss with prejudice, holding that Foster, like judges, was shielded by absolute immunity. We affirm.

* * *

We may quickly dispatch Wagshal's claim to injunctive relief. While such a claim is not barred by judicial immunity, *Pulliam v. Allen*, 466 U.S. 522, 528–43 (1984), Wagshal lacks standing to seek such an injunction on behalf of others, see, e.g., *Los Angeles v. Lyons*, 461 U.S. 95, 108–09 (1983), and has alleged no likelihood whatever that he himself will again suffer the alleged injury, *id.* at 105–10.

Foster's first line of defense against the damages claim was the assertion of quasi-judicial immunity. The immunity will block the suit if it extends to case evaluators and mediators, so long as Foster's alleged actions were taken within the scope of his duties as a case evaluator.

Courts have extended absolute immunity to a wide range of persons playing a role in the judicial process. These have included prosecutors, *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); law clerks, *Sindram v. Suda*, 986 F.2d 1459, 1460 (D.C. Cir. 1993); probation officers, *Turner v. Barry*, 856 F.2d 1539, 1541 (D.C. Cir. 1988); a court-appointed committee monitoring the unauthorized practice of law, *Simons v. Bellinger*, 643 F.2d 774, 779–82 (D.C. Cir. 1980); a psychia-

trist who interviewed a criminal defendant to assist a trial judge, *Schinner v. Strathmann*, 711 F. Supp. 1143 (D.D.C. 1989); persons performing binding arbitration, *Austern v. Chicago Bd. Options Exch., Inc.*, 898 F.2d 882, 886 (2d Cir. 1990); and a psychologist performing dispute resolution services in connection with a lawsuit over custody and visitation rights, *Howard v. Drapkin*, 271 Cal. Rptr. 893, 905 (Ct. App. 1990). On the other hand, the Supreme Court has rejected absolute immunity for judges acting in an administrative capacity, *Forrester v. White*, 484 U.S. 219, 229 (1988), court reporters charged with creating a verbatim transcript of trial proceedings, *Antoine v. Byers & Anderson, Inc.*, 113 S. Ct. 2167 (1993), and prosecutors in relation to legal advice they may give state police, *Burns v. Reed*, 500 U.S. 478 (1991). The official claiming the immunity "bears the burden of showing that such immunity is justified for the function in question." *Antoine*, 113 S. Ct. at 2169–70 n.4 (citing *Burns v. Reed*, 500 U.S. at 486).

We have distilled the Supreme Court's approach to quasi-judicial immunity into a consideration of three main factors: (1) whether the functions of the official in question are comparable to those of a judge; (2) whether the nature of the controversy is intense enough that future harassment or intimidation by litigants is a realistic prospect; and (3) whether the system contains safeguards which are adequate to justify dispensing with private damage suits to control unconstitutional conduct. *Simons v. Bellinger*, 643 F.2d at 778 (citing *Butz v. Economou*, 438 U.S. 478, 512 (1978)).

In certain respects it seems plain that a case evaluator in the Superior Court's system performs judicial functions. Foster's assigned tasks included identifying factual and legal issues, scheduling discovery and motions with the parties, and coordinating settlement efforts. These obviously involve substantial discretion, a key feature of the tasks sheltered by judicial immunity and the one whose absence was fatal to the court reporter's assertion of immunity in *Antoine*. See 113 S. Ct. at 2170–71. Further, viewed as mental activities, the tasks appear precisely the same as those judges perform

going about the business of adjudication and case management.

Wagshal protests, however, that mediation is altogether different from authoritative adjudication, citing observations to that effect in radically dissimilar contexts. See, e.g., *General Comm. of Adjustment v. Missouri–Kan.–Tex. R.*, 320 U.S. 323, 337 (1943) ("The concept of mediation is the antithesis of justiciability."). However true his point may be as an abstract matter, the general process of encouraging settlement is a natural, almost inevitable, concomitant of adjudication. Rule 16 of the Federal Rules of Civil Procedure, for example, institutionalizes the relation, designating as subjects for pre-trial conferences a series of issues that appear to encompass all the tasks of a case evaluator in the Superior Court system: "formulation and simplification of the issues", "the possibility of obtaining admissions of fact and of documents", "the control and scheduling of discovery", and a catch-all, "such other matters as facilitate the just, speedy, and inexpensive disposition of the action." Fed. R. Civ. P. 16(c). Wagshal points to nothing in Foster's role that a Superior Court judge might not have performed under Superior Court Rule 16(c), which substantially tracks the federal model. Although practice appears to vary widely, and some variations raise very serious issues, see, e.g., *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989) (en banc), it is quite apparent that intensive involvement in settlement is now by no means uncommon among federal district judges. See, e.g., Robert J. Keenan, *Rule 16 and Pretrial Conferences: Have We Forgotten the Most Important Ingredient?*, 63 S. Cal. L. Rev. 1449 (1990); Symposium, *The Role of the Judge in the Settlement Process*, 75 F.R.D. 203 (1976).

Wagshal does not assert that a case evaluator is performing a purely administrative task, such as the personnel decisions—demotion and discharge of a probation officer—at issue in *Forrester v. White*. Because the sort of pre-trial tasks performed by a case evaluator are so integrally related to adjudication proper, we do not think that their somewhat managerial character renders them administrative for these purposes.

Conduct of pre-trial case evaluation and mediation also seems likely to inspire efforts by disappointed litigants to recoup their losses, or at any rate harass the mediator, in a second forum. Cf. *Butz v. Economou*, 438 U.S. at 512 ("The loser in one forum will frequently seek another, charging the participants in the first with unconstitutional animus."). Although a mediator or case evaluator makes no final adjudication, he must often be the bearer of unpleasant news—that a claim or defense may be far weaker than the party supposed. Especially as the losing party will be blocked by judicial immunity from suing the judge, there may be great temptation to sue the messenger whose words foreshadowed the final loss. Cf. *Sindram v. Suda*, 986 F.2d at 1461 (noting that loser may turn on clerks because unable to reach the judge).

The third of the Supreme Court's criteria, the existence of adequate safeguards to control unconstitutional conduct where absolute immunity is granted, is also present. Here, Wagshal was free to seek relief from any misconduct by Foster by applying to Judge Levie. Alternatively, if he thought Foster's communications might prejudice Judge Levie, he could have sought Levie's recusal under Superior Court R. Civ. P. 63–I, Bias or Prejudice of a Judge. The avenues of relief institutionalized in the ADR program and its judicial context provide adequate safeguards.

Wagshal claims that even if mediators may be generally entitled to absolute immunity, Foster may not invoke the immunity because his action was not taken in a judicial capacity, see *Mireles*, 112 S. Ct. at 288 (citing *Forrester*, 484 U.S. at 227–29; *Stump*, 435 U.S. at 360), and because he acted in complete absence of jurisdiction, see *id.* (citing *Stump*, 435 U.S. at 356–57; *Bradley*, 13 Wall. at 351). Neither exception applies.

Wagshal's argument that the acts for which he has sued Foster are not judicial (apart from the claim against mediators generally) rests simply on his claim that Foster's letter to Judge Levie, stating that he felt he "must recuse" himself and giving his thoughts on possible further mediation efforts

and allocation of costs, breached Foster's obligations of neutrality and confidentiality. We assume such a breach for purposes of analysis. But "if judicial immunity means anything, it means that a judge 'will not be deprived of immunity because the action he took was in error . . . or was in excess of his authority.' " *Mireles*, 112 S. Ct. at 288 (quoting *Stump*, 435 U.S. at 356). Accordingly we look to the particular act's relation to a general function normally performed by a judge". *Mireles*, 112 S. Ct. at 288–89. Applying the same principle to case evaluators, we have no doubt that Foster's announcing his recusal, reporting in a general way on the past course of mediation, and making suggestions for future mediation were the sort of things that case evaluators would properly do.

Wagshal finally argues that Foster cannot be immune for the statements in his letter made after he stated that he "must recuse" himself. This is frivolous. Even if the letter alone effected a recusal (which is doubtful—Judge Levie clearly saw himself as later excusing Foster from service), the simultaneous delivery of an account of his work was the type of act a case evaluator could properly perform on the way out. In fact, we doubt very much if a modest gap in time between effective recusal and recounting of the events would take the latter out of the immunity.

Nor were Foster's actions "taken in the complete absence of all jurisdiction." Wagshal's claim to the contrary rests primarily on the theory that, although Superior Court Rule of Civil Procedure 16(j) requires parties to "attend . . . any alternative dispute resolution session ordered by the court", there is no explicit authority to *appoint* case evaluators. This contrasts, says Wagshal, with explicit District law authorizing appointment of masters and hearing commissioners. See, Superior Court R. Civ. P. 53(a) & (b) (masters); D.C. Code § 11–1732(a) (hearing commissioners).

Whatever merit this claim may have under District law, it does not come within a country mile of showing complete absence of jurisdiction. For such a showing, the judicial officer must "know[ ] that he lacks jurisdiction, or act[ ]

despite a clearly valid statute or case law expressly depriving him of jurisdiction." *Mills v. Killebrew*, 765 F.2d 69, 71 (6th Cir. 1985) (citing *Rankin v. Howard*, 633 F.2d 844, 849 (9th Cir. 1980)). Similarly, in *White by Swafford v. Gerbitz*, 892 F.2d 457, 462 (6th Cir. 1989), the court held that a judge enjoyed judicial immunity when, despite procedural defects in his appointment, he "possessed the office of Special City Judge and was discharging the duties of that position under color of authority." Foster was similarly discharging the duties of case evaluator under color of authority.

At no point does Wagshal develop his constitutional attacks on Foster's jurisdiction, which evidently rest on the theory that the District's use of case evaluators for mandatory but non-binding dispute resolution violates the due process clause of the Fifth Amendment and the right to jury trial guaranteed by the Seventh Amendment. We do not normally pass upon claims that a party fails to articulate intelligibly. *Int'l Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, 1487 (D.C. Cir. 1994).

* * *

We hold that absolute quasi-judicial immunity extends to mediators and case evaluators in the Superior Court's ADR process, and that Foster's actions were taken within the scope of his official duties. The judgment of the district court is

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEROME S. WAGSHAL,

Plaintiff, Civil Action No. 92-2072 (TPJ)

v.

MARK W. FOSTER, et al., FILED FEB 5 - 1993

Defendants.

MEMORANDUM AND ORDER

This federal civil action against a state-court-appointed mediator and his law partners, brought by a litigant who believes himself to have been wronged by the mediator in the course of court-ordered "alternative dispute resolution" ("ADR") proceedings, is presently before the Court on defendants' motion, in advance of answer, to dismiss or for summary judgment on the ground of judicial immunity. The record presently before the Court is sufficient for the disposition hereinafter made of defendants' motion, and although the Court has stayed all discovery pending a ruling upon the motion,

it is satisfied that no material facts could be shown to alter the conclusion dictated by those set forth below.[1]

I.

In June, 1990, Jerome Wagshal brought suit in the Superior Court of the District of Columbia against the manager of real property owned by Wagshal ("the Sheetz case"). In October, 1991,the Honorable Richard A. Levie, the Superior Court judge to whom the case had been assigned, ordered a stay of discovery pending efforts to bring the case to settlement through the Superior Court's ADR program, and referred the case, over Wagshal's objection, to a "case evaluator." In the Superior Court APR is mandatory.[2]

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[1] At the moment only plaintiff has initiated discovery. If defendants possess the immunity they claim, however, the immunity alone should relieve them of the obligation to respond.

[2] The alternative dispute resolution program of the Superior Court is a formal division of the court established by order of its Chief Judge, known as the "Multi-Door Dispute Resolution Division," and offers mediation, arbitration, and case evaluation processes to

Wagshal then objected to the first case evaluator appointed as having a "conflict of interest," and Judge Levie accordingly appointed the defendant Mark W. Foster, Esquire, as a substitute on November 21, 1991. The appointing order provided that the evaluation was to be governed by a "statement of understanding" as to "confidentiality," to be signed by the parties, by which the parties acknowledged that the evaluator was a "neutral;" that the proceedings were deemed to be "privileged," and were "not [to] be disclosed in any subsequent proceeding;" that the parties were not to subpoena the evaluator or any documents submitted to him; and that the evaluator would not "voluntarily

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litigants in lieu of trial and judgment. "Case evaluators" for cases such as the Sheetz case are members of the District of Columbia Bar, with at least five years of relevant litigation experience, who volunteer to serve without compensation, undergo required training, and are approved as such by the court.
For purposes of this case the functions of mediators and evaluators are indistinguishable.

testify on behalf of a party." Wagshal signed under protest on January 30, 1992.

Wagshal's counsel then interposed an objection to Mr. Foster as an evaluator, questioning Foster's neutrality once again on the basis of a perceived "conflict of interest," and, when Wagshal refused Foster's express request that Wagshal either waive the objection or make an issue of it before proceeding with evaluation, on February 19, 1992, Foster wrote to Judge Levie to recuse himself as an evaluator. The alleged "conflicts of interest" asserted by Wagshal as to both himself and his predecessor, Foster said, were in his opinion "attenuated," although sufficient to warrant appointing yet another evaluator if it presented an obstacle to the process. In his opinion, however, Foster thought the Sheetz case could and should be settled. He suggested that the court remonstrate with Mr. Wagshal as to his obligations under the

court's rules concerning mediation, implying that Wagshal's attitude represented the principal impediment to the success of the process. Foster offered to transfer his files to a successor on short notice, and to be of any assistance he could to the court otherwise.

In a telephone conference call hearing on February 20, 1992, Judge Levie agreed with Mr. Foster's observations that the alleged conflicts of interest were "attenuated" -- indeed, would have been of no consequence to him had he been asked for a ruling -- but he acceded to Mr. Foster's recusal and excused him from further participation in the conference. Judge Levie then reiterated his determination to maintain the stay of discovery in place and to try once more with case evaluation.

This Court is advised that a third evaluator was appointed, and the Sheets case eventually settled.

II.

On September 10, 1992, Wagshal, pro se, filed this 28-page, nine-count complaint in the U.S. District Court for the District of Columbia against Mark W. Foster, and 16 of his partners in his Washington, D.C. law firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker. Wagshal prays for compensatory damages of $1 million, and punitive damages of $500,000, "jointly and severally," and an injunction prohibiting Foster from committing "violations of litigants' rights" in the future.[3] The gravamen of Wagshal's complaint is that Foster, as a court-appointed evaluator, so comported himself as to reflect unfavorably upon the merits of Wagshal's claims in the Sheets case, making known his opinion to others, including Judge Levie, to such an extent that the ultimate resolution

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[3]. Wagshal charges Foster with deprivation of his constitutional rights; defamation; invasion of privacy; breaches of confidential and fiduciary obligations; tortious interference with civil litigation; and intentional infliction of emotional distress.

of the Sheets case was less to his satisfaction than Wagshal thought it ought to have been.

Institutionalized, court-sponsored "alternative dispute resolution" of civil lawsuits has evolved of late to relieve court congestion and to expedite the disposition of civil litigation without the full panoply of judicial process and the inordinate expense it entails. It is of relatively recent origin, although more courts are employing it across the country as time passes, and with encouraging results. In its most common form it employs private members of the bar, recruited, trained, and serving, pro bono publico, under the aegis, and as officers, of the court, who assist the parties to legal disputes to find sufficient common ground to form the basis of a settlement.

A review of the case law, however, reveals that court-appointed mediators and their like have not been around long enough

to have generated much in the way of precedent with respect to the extent to which they enjoy the immunity of the court whom they serve when they venture into a private controversy represented by a pending case, and in the course thereof, antagonize one or more of the parties. Other, more traditional agents of the judicial process have, however, historically been held to possess such immunity when they act in their official capacities,[4] and this Court concludes that

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4.Judges have absolute immunity from damage liability for actions taken in their judicial capacity. Forrester v. White, 484 U.S. 219 (1988). This absolute immunity may be extended to other officials when their activities are integrally related to the judicial process and when they perform a judicial function as an officer of the court. Schinner v. Strathman, 711 F. Supp. 1143 (D.D.C. 1989) (psychiatrist appointed to determine defendant's mental competency to stand trial). See, e.g., Imbler v. Pachtman, 424 U.S. 409, 430 (1976) (prosecutors); Crosby-Bey v. Jansson, 386 F. Supp. 96, 98 (D.D.C. 1984) (probation officer); Simons v. Bellinger, 643 F.2d 774 (D.C. Cir. 1980) (court-appointed committee monitoring unauthorized practice of law); Wolff v. Faris, 1989 U.S. Dist. LEXIS 8520 (N.D. Ill. July 19, 1989) (conciliator in custody dispute); Howard v. Drapkin, 222 Cal. App. 3d

court- appointed arbitrators, mediators, case evaluators, and others who are directly involved in ADR programs with express authority from the court may properly invoke the same protection, for similar reasons.

In the instant case it appears that Mr. Foster was discharging his duty to the Superior Court of the District of Columbia, and acting with the knowledge and approval of the judge by whom he had been appointed, in all the respects with which plaintiff finds fault with his performance. He therefore possesses that court's judicial immunity, and this complaint, and each count thereof must be dismissed as to all defendants.[5]

843, 860 (1990)("[A]bsolute immunity is properly extended to neutral third persons who are engaged in mediation, conciliation, evaluation or similar dispute resolution efforts."); Austern v. Chicago Board Options Exchange, Inc., 898 F.2d 882, 886 (2d Cir.) (arbitrators), cert. denied, 111 S.Ct. 141 (1990).

[5]This Court is unable to perceive any basis upon which plaintiff might have concluded that Mr. Foster's law firm and his partners, as distinguished from Mr. Foster himself,

For the foregoing reasons, it is, this 5th day of February, 1993,

ORDERED, that defendants' motion to dismiss or for summary judgment is granted, and the complaint is dismissed with prejudice.

/s/ Thomas Penfield Jackson

U.S. District Judge

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could be liable to him on the allegations of his complaint. Mr. Foster was acting at all times exclusively as an agent of the Superior Court, without compensation to him or his firm. Accordingly, the Court invites the defendants other than Mr. Foster to apply for sanctions pursuant to Fed. R. Civ. P. 11 if they elect to do so.

APPENDIX C

(Denial of Petition For Rehearing)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-5063 **September Term, 1993**

USDC CV 92-2072

Jerome S. Wagshal,

Appellant,

v.

Mark W. Foster, Roger E. Zuckerman, Roger C. Spaeder, Bruce Goldstein, William W. Taylor, III, Peter R. Kolker, Janet M. Meigurger, Stephen H. Glickman, Lawrence A. Katz, Anthony Thompson, Nelson C. Cohen, Steven M. Salky, Edward C. Berkowitz, Judith Sturtz Karp, Donald J. McCartney, Eric F. Facer, Marshall S. Wolff,

Appellees

BEFORE: Silberman, Williams and Randolph, Circuit Judges

O R D E R

Upon consideration of appellant's petition for rehearing, filed August 15, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

RON GARVIN, CLERK

BY:

Robert A. Bonner

Deputy Clerk

APPENDIX D

(Order appointing Foster)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

Civil Division

JEROME S. WAGSHAL	)	
	)	
v.	)	Civil Action No.
	)	90-6155
CHARLES E. SHEETS, et al.)		Civil I-Calendar 3

AMENDED ORDER

(Case Evaluation)

(November 21, 1991)

Having previously appointed a case evaluator, who was later excused from further service, it is this 21st day of November, 1991:

ORDERED that Mark W. Foster, Esq., a member of the firm of Zuckerman, Spaeder, Goldstein, Taylor & Kolker (202-778-1800), is hereby appointed as the Case Evaluator for this matter; and it is

FURTHER ORDERED that

[Provisions relating to functions of the Evaluator, and duties of counsel and the parties omitted.]

FURTHER ORDERED that the confidentiality of the Evaluation be governed by the Statement of Understanding which shall be signed by all parties and counsel; and it is

FURTHER ORDERED that the Evaluator may consult with the Court regarding matters of timing and procedure; and it is

FURTHER ORDERED that Mr. Kaplan may furnish to Mr. Foster all documents provided to Mr. Kaplan in his capacity as case evaluator, in which event the parties need not provide to Mr. Foster documents previously given to Mr. Kaplan.

/s/ _____.

RICHARD A. LEVIE

Associate Judge

Signed In Chambers

Copies mailed to:

[copies to counsel and appointees]

APPENDIX E

(Statement of Understanding)

CALENDAR #_____

MULTI-DOOR DISPUTE RESOLUTION DIVISION

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

STATEMENT OF UNDERSTANDING: MEDIATION AND CASE EVALUATION

Please Note: This form will be signed by all individuals immediately prior to the beginning of the mediation or case evaluation session.

The mediator or case evaluator indicated below has been assigned to facilitate your case. He/she will serve as a neutral party to help you resolve your dispute. He/she will not act as an attorney or advocate for any party.

If you do not have an attorney with you today, you may wish to consult an attorney or consider having an attorney independently review any written settlement statement before you sign. If you do not wish to have

your agreement reviewed by an attorney, you are not required to do so.

The parties and attorneys whose signatures appear below agree that all proceedings at their settlement conference, including any statement made or document prepared for the conference by any party, attorney or other participant, are privileged and shall not be disclosed in any subsequent proceeding or document or construed for any purpose as an admission against interest. The phrase "document prepared for the conference by any part, attorney or other participant" shall not be deemed to apply to any settlement agreement that may result from their conference. No party shall be bound by anything said or done at the conference unless a settlement is reached. if a settlement is reached, the agreement shall be reduced to writing and, when signed, shall be binding upon all parties to the agreement. The parties agree not to subpoena the

evaluator or mediator or any documents submitted to the mediator or evaluator. In no event will a mediator or evaluator voluntarily testify on behalf of a party.

Please sign below to acknowledge that you have read and understand this Statement.

[signatures of plaintiff] [signature of Wagshal] "Neutral" Foster]

Signed because of 11/21/91

Order requiring signature

[signature of plaintiff's attorney

Date: January 30, 1992

Wagshal et al Civil Action No. 90-CA 06155

vs. Sheetz et al.

APPENDIX F

(Foster's letter to the Court - "The Foster Court letter")

[Letterhead of Zuckerman, Goldstein, Taylor & Kolker]

February 19, 1992

BY TELECOPIER AND REGULAR MAIL (202) 879-7031

The Honorable Richard A. Levie
Associate Judge
Superior Court of the District of Columbia
500 Indiana Avenue, N.W.
Washington, D.C. 20001

Wagshal v. Sheetz, C.A. No. 90-CA06155

Dear Judge Levie:

On November 21, 1991, you issued an order appointing me to serve as Case Evaluator for the above-referenced matter in the place of Warren Kaplan, whose neutrality in the matter had been challenged by the plaintiff, Jerome S. Wagshal. Thereafter, I arranged for the transfer of Mr. Kaplan's files to this office, made an extensive

review of the file and conducted a half day mediation session with the parties on January 30, 1992. As a result off that mediation session, I felt there was a realistic chance that the case might be settled by mediation and that, even if no settlement were to eventuate, an attempt should be made to agree upon phased discovery in the case.

Accordingly, I scheduled a follow-up session for February 20, 1992, this time for a full day.

In the interim between the two mediation sessions, I received a letter from plaintiff's counsel challenging my neutrality in this matter on account of various connections between this firm and the Home Insurance Company. I responded by detailing as best I could the exact nature of those connections and insisting that plaintiff and his counsel either waive any objection or consent to my going forward. Their consent has not been forthcoming, and, given the

prior history of this case, I feel that I must recuse myself and recertify this matter to you. My files in this matter are quite well organized and can he transferred to another mediator of your choice upon short notice.

Based upon the knowledge that I have obtained in this case up to this point, I strongly urge you to order Mr. Wagshal, as a pre-condition to any further proceedings in his case, to engage in a good faith attempt at mediation. In my view, and based upon my experience as a Superior Court mediator, this is a case that can and should be settled if the parties are willing to act reasonably. Even if no settlement is forthcoming, this case can surely benefit from some agreed-upon phased discovery rather than an unregulated discovery free-for-all.

Mr. Wagshal has now challenged two neutral mediators appointed by this court, in both cases on grounds that can be

characterized as attenuated. It seems to me that Mr. Wagshal ought to be required to fulfil his obligations under the court's rules concerning mediation before he is allowed to proceed with his suit. You may also wish to consider who should bear the defendant's costs in participating in two aborted mediations. I very much regret the time that has now been wasted by my predecessor, Mr. Kaplan, and by all counsel and their clients as a result of this second failure to complete scheduled mediation.

If I can be of any further assistance, please feel free to call me.

Sincerely yours,

/s/

Mark W. Foster

cc: Brian W. Shaughnessy, Esquire (by telecopier)

Carol Ann Petren, Esquire (by telecopier)

Brian R. Zapp, Esquire (by telecopier)

Ira T. Kasden, Esquire (by telecopier)

APPENDIX G

(Foster's letter to counsel - "The Foster' Counsel letter")

[Letterhead of Zuckerman, Goldstein, Taylor & Kolker]

February 19, 1992

BY TELECOPIER AND REGULAR MAIL (202) 371-9046

[Addressed to all four counsel in the case.]

Wagshal v. Sheetz, C.A. No. 90-CA06155

Dear Counsel:

I regret to inform you that I must cancel our scheduled mediation session now scheduled for Thursday, February 20, 1992.

On February 5, 1992, Mr. Shaughnessy, acting on behalf of the plaintiff, sent me a letter challenging my impartiality in this case on the grounds that our firm had what he characterized as "general and continuing obligations" to the Home Insurance company, which is the underwriter on Mr. Clarke's policy.

On February 12, 1992, I responded to Mr. Shaughnessy setting forth all of the connections of any kind between this law firm and the Home Insurance Company of which I am, after inquiry, aware. I insisted that Mr. Shaughnessy's client take a position as to whether he was challenging my ability to serve in this matter by noon on Tuesday, February 18, 1992. My letter to Mr. Shaughnessy stated that, if no response was received waiving the objection by that time, I would take it that Mr. Shaughnessy and his client objected to my continuing to serve as a neutral mediator. I had no response from Mr. Shaughnessy by the deadline set. I did receive a response filed out of time in which Mr. Shaughnessy and his client continue to attempt to straddle the issue by casting on me the burden of a sort of voir dire process. I am not satisfied by this attempt to "conditionally object" to my objectivity so that, if the mediation

process does not go as he wishes, Mr. Wagshal can attack my impartiality at a future point. Thus, by the terms of my letter to Mr, Wagshal, I am forced to recertify this case to Judge Levie and to urge him to appoint a successor mediator. A copy of my letter to the judge is enclosed.

I genuinely regret the expense and inconvenience that this has caused your clients, but I feel that, in view of the position that Judge Levie took in response to Mr. Shaughnessy's Motion to Disqualify Mr.. Kaplan, I have no choice in the matter.

Sincerely yours,

/s/

Mark W. Foster

Enclosure